REMARKS

I. STATUS OF CLAIMS

Claims 1-39 are pending. Claims 2-29 and 31-39 are amended to correct minor formatting or typographical issues with the claims. The further amendments to Claims 8 and 14 are supported in the specification at least on page 9 for claim 8 and at least on page 15 for claim 14. Accordingly, no new matter is added by this Reply.

II. SPECIFICATION

The Office identifies the use of certain trademarks in the present specification and goes on to note that these marks should be capitalized and be accompanied by the generic terminology. Office Action at page 2. Although the Office makes these observations, a formal objection was not lodged against the use of these terms in the application. *Id.* However, in order to respond to the Office's observation and thwart a later formalized objection, Applicant notes that the trademarks identified by the Office (*e.g.*, LUVITOL, KRATON, VERSAGEL, PERMETHYL, EXPANCEL, POLYTRAP, ORGASOL, TEFLON and BENTONE) are generally accompanied by the phrase "such as sold under the name of" and at least the first letter of the referenced trademark is capitalized and in most instances, the trademark is in quotation marks. As such, the proprietary nature of the trademarks is respected and thus, their use does not adversely affect the validity of the trademarks. In most instances, the initial use of the trademark is preceded by a general description of the component.

For example, Applicant's specification at pages 22 and 23 discloses the use of "Luvitol" and "Kraton" in the following manner:

> Examples of these polymers include sequential copolymers, in particular, of "diblock" or "triblock" type, the polystyrene/polyisoprene or polystyrene/polybutadiene type, such as those sold under the name of "Luvitol HSB" by BASF, the polystyrene/copoly(ethylene-propylene) typem such as those sold under the name "Kranton" by Shell Chemical Co., ...

Given the identification and context of the use of the trademarks in the present specification, Applicant believes that proper identification has been made to such trademarks.

III. CLAIM REJECTION UNDER 35 U.S.C. § 112

The Office rejects claims 8, 14, and 33-39 under 35 U.S.C. § 112, second paragraph, as indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Office Action at page 2. In particular, according to the Office, the recitation of "can form a film" in claim 8 "implies a potential or capability of forming a film" and is unclear whether such a limitation is required or merely a possibility. *Id.* at page 3. In addition, the terms "higher" in reference to fatty acids and fatty alcohols in claim 14 is unclear. *Id.* The remaining claims, *i.e.*, claims 33-39, are dependent on rejected claim 14. *Id.* Although Applicant disagrees with this rejection, in order to advance prosecution, Applicant has amended claims 8 and 14.

Applicant has amended Claim 8 to recite that the film forms upon topical application, which is supported by the present disclosure at page 9.

Applicant has further amended Claim 14 to insert a range of carbon atoms directed to the "higher fatty acids" and "high fatty alcohols" exemplified in the specification at page 15. In particular, the present specification identifies the following

"higher fatty acids" and it is well known in the art that these listed fatty acids have the below listed number of carbon atoms:

Acid	Number of Carbon Atoms
Myristic Acid	14
Palmitic Acid	16
Stearic Acid	18
Behenic Acid	22
Oleic Acid	18
Linoleic Acid	18
Linolenic Acid	18
Isostearic Acid	18

Thus, the addition of the phrase "having at least 14 carbon atoms" to "higher fatty acids" finds ample support in the specification. In addition, the present specification identified the following "higher fatty alcohols" and it is also well known in the art that these listed fatty alcohols have the below listed number of carbon atoms:

Alcohol	Number of Carbon Atoms
Cetanol	16
Stearyl Alcohol	18
Oleyl Alcohol	18
Linoleyl or Linolenyl Alcohol	18
Isostearyl alcohol or octyldodecanol	18

Thus, the addition of the phrase "having at least 16 carbon atoms" to "higher fatty alcohols" finds support in the present specification. Accordingly, no new matter is added by these amendments and as such, the rejection is rendered moot. Applicant therefore respectfully requests the withdrawal of the rejection.

IV. CLAIM REJECTION UNDER 35 U.S.C. § 102

The Office rejected claims 1-39 under 35 U.S.C. § 102(b) as anticipated by WO 97/00662 (of which U.S. Patent No. 5,945,095 is the counterpart and is the document cited throughout this discussion) to Mougin et al. ("Mougin"). Office Action at page 3. According to the Office, Mougin teaches "a cosmetic composition comprising fatty substances and pulverulent compounds comprising a dispersion of surface-stabilized polymer particles in a liquid fatty phase." *Id.* In particular, the Office identifies Mougin as teaching (1) film-forming polymers; (2) liquid fatty substance; (3) stabilizing polymer; and (4) sequential or grafter block copolymers. *Id.* at pages 4 and 5. Relying on those teachings, the Office concludes that claims 1-39 are anticipated by Mougin. Applicant, however, respectfully disagrees and traverses the rejection for the following reasons.

A claim is anticipated only if each and every element as set forth in the claims is found, either expressly or inherently, in a single prior art reference. M.P.E.P. § 2131 (8th ed. Rev. 3, Aug. 2005). The identical invention must be shown in as complete detail as is contained in, and must be arranged as required by, the claim. *Id.* Further, the reference must "'clearly and unequivocally' disclose the claimed compound or direct those skilled in the art to the compound *without any need for picking, choosing, and combining various disclosures . . . .*" *In re Arkley*, 455 F.2d 586, 587, 17 U.S.P.Q. 524, 526 (C.C.P.A. 1972) (emphasis added). As such, the reference must provide a certain degree of precision with respect to the specific compound(s) and/or composition(s) claimed. That is not the case with Mougin.

Under the Office's rationale, Mougin's stabilizing polymer is not only relied upon to anticipate the stabilizing agent recited in the present claims, but also to anticipate "a

fat-soluble rheological agent." Mougin, however, does not provide for such a fat-soluble rheological agent. Instead, the Office selectively picks, chooses, and combines Mougin to arrive at the present invention in apposite to Section 102, and as such, Mougin fails to anticipate the present claims within the meaning of Section 102.

Under the Office's rationale, the stabilizing agent recited in the present claims is akin to Mougin's teaching at Col. 7, ll. 10-12 directed to a stabilizer polymer. Office Action at page 4. This teaching provides that "the solubilizing polymer used during the polymerization must be soluble, or dispersible, in the synthesis solvent and in the fatty substance." Mougin at Col. 7, ll. 10-12. This teaching, however, is part of a larger disclosure directed to stabilizing polymers spanning from Col. 6, line 56 to Col. 8, line 33. In fact, within this disclosure, Mougin explains that these stabilizer polymers may be "*a sequential polymer*, a grafted polymer and/or random polymer, alone of as a mixture" that may comprise "at least one block resulting from the polymerization of dienes . . . and at least one block of a vinyl polymer." *Id.* at Col. 6, ll. 56-59; Col. 7, ll. 38-41 (emphasis added). It is this disclosure that the Office appears to be relying on to teach another element of the present invention, namely the fat soluble rheological agent.

As disclosed in the present specification at pages 20-25 and 25-27, the stabilizing agent and the rheological agent are distinct components. On page 20 of the present specification, Applicant discloses that "*the polymer particles are stabilized at the surface*, as polymerization proceeds, by virtue of a stabilizing agent . . . ." Applicant's Specification at page 20 (emphasis added). In contrast, on page 25, Applicant explains that "this or these rheological agents are fat soluble agents capable of *thickening and/or gelling the composition*." *Id.* at page 25 (emphasis added). Mougin, however, at Col. 7,

ll. 8-10 provides that the stabilizing polymers are absorbed onto the surface of the polymer particles and therefore, cannot be available as thickeners.

In addition, Mougin does not teach the use of a second stabilizer nor requires it to be formed from "[the] polymerization of at least one monomer possessing an ethylenic bond," as recited in independent claim 1. Instead, Mougin's reference to sequential and/or grafted block copolymers from the polymerization of diene and at least one block vinyl polymer merely constitutes an enablement showing for the stabilizer, but does not teach the subject matter of "at least one fat soluble rheological agent." Meaning, Mougin's disclosure of sequential and/or graft copolymers shows possession of the language which embraces the stabilizer not an additional distinct claim element such as the rheological agent as is presently claimed. As such, Mougin's teaching of a stabilizer, which includes numerous possible species, does not necessarily *ipso facto* "disclose," let alone teach the use of one of the species in a different manner.

Accordingly, under Section 102, the reference must disclose the composition or direct a skilled artisan to the composition without the need for picking, choosing and combining various discloses. *Arkley*, 455 F.2d at 587, 17 U.S.P.Q.2d at 526. In this case, a skilled artisan would have to not only use a stabilizer, but also use a second stabilizer in a manner not even suggested, much less taught by Mougin. In addition, the second stabilizer could not just be any stabilizer; it must be one that has at least one block resulting from the polymerization of dienes. To arrive at such a conclusion from the teachings of Mougin, one would have to at least pick, choose, and combine various disclosures without any instruction from Mougin.

Because Mougin's disclosure does not identically disclose the present invention, Mougin cannot serve as a Section 102 reference anticipating claims 1-39, as provided by the Office. Accordingly, the rejection is improper and Applicant respectfully requests its withdrawal.

V. CLAIM REJECTION UNDER 35 U.S.C. § 103

The Office also rejected claims 1, 6-14, 16, 19, 26, 28, and 29 under 35 U.S.C. § 103(a) as obvious over U.S. Patent No. 5,589,195 to Potter ("Potter"). Office Action at pages 5-7. According to the Office's rationale, Potter teaches an emulsion comprising a lipophilic phase, an aqueous phase and a protein emulsifier disclosing the elements recited in the rejected claims. *Id.* at page 6. Further, "Potter's compositions could be used in topical applications in lieu of the compositions of the instant application, because Potter's compositions comprises lipophilic proteins, which function as thickeners and stabilizing agents (*i.e.*, emulsifiers) and liquid fatty phase (*e.g.*, oils)." *Id.* at pages 6 and 7. Applicant respectfully disagrees and traverses the rejection for at least the following reasons.

To establish a *prima facie* case of obviousness, three criteria must be met: (1) there must be some suggestion or motivation to combine the reference teachings; (2) there must be a reasonable expectation of success; and (3) the prior art references must teach or suggest all the claim limitations. M.P.E.P. § 2143. In this case, Potter fails to teach all the claim limitations.

Potter's inclusion of the pro teinaceous material is to "overcome" the use of, *e.g.*, separate emulsifiers and film-forming polymers, that avoids safety concerns from a

consumer standpoint stemming from the inclusion of these components in a composition. Mougin at Col. 1, line 9-Col. 2, line 29. The Office even admits as much by stating that "Potter's compositions could be used in topical applications *in lieu of the compositions of the instant application*, because Potter's compositions comprise lipophilic proteins, which function as thickeners and stabilizing agents (i.e., emulsifiers) and liquid fatty phase (e.g., oils)." Office Action at pages 6 and 7 (emphasis added). To that end, Potter seeks to overcome the difficulties in the art by substituting these identified components with the proteinaceous material. In contrast, the present invention seeks to overcome difficulties in the art by using a particular combination of components, not removing them from the composition.

For example, under the Office's rationale, Potter's use of the proteinaceous material corresponds with the present claim elements of the stabilizer, the polymer particles, and the rheological agent. Office Action at page 6. The rejected claims, however, recite that a rheological agent thickens the fatty phase and a stabilizing agent stabilizes the polymer particles at the surface of the liquid fatty phase (i.e., the rheological agent, the stabilizing agent and the polymer particles are separately required claim elements). The required inclusion of these claim elements is further evidenced in Applicant's specification that separately discloses and describes each of these claim elements as found at least on pages 9-14, 20-25, and 25-27.

Potter, moreover, teaches an emulsifier *consisting essentially of* a proteinaceous material. Potter at Col. 2, ll. 47 and 48. Thus, Potter teaches away from the inclusion of separate stabilizer, rheological agent and/or polymer particles. "A prior art reference

that 'teaches away' from the claimed invention is a significant factor to be considered in determining obviousness." M.P.E.P. § 2145 (X)(D)(1).

Based on at least the foregoing reasons, a *prima facie* case of obviousness has not been established and as such, Applicant respectfully requests the withdrawal of the rejection.

VI. CONCLUSION

In view of the foregoing amendments and remarks, Applicant respectfully requests reconsideration of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

Respectfully submitted,

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